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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

DONALD MARKS,
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DAVID STOCK,
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Several items in the Government's brief require answer, and the Court's attention is respectfully called to the following points.

1. An inaccuracy in the statement of facts at page 3 is important in its bearing upon the singleness of the interest transferred by petitioner. The Government states that "in view of the nature of the London market, the Vice President concluded that it was better to sell the silver in lots over a longer period of time"; and then recites that the sales were made from December 3, 1935, to January 6, 1936. It is to be noted, however, that the special findings of fact set forth only that the Vice President, in view of the nature of the London market, and in the exercise of his best judgment, concluded that it would be imprudent to offer the entire two

million ounces of silver bullion for sale in one lot either "at the market" or "at the fixing" or "at a price" (Finding 14, R. 12); and that between December 10, 1935, and January 3, 1936, there was no opportunity to make any sales because of the disturbed conditions of the market (Finding 15, R. 13). It should be noted that the Court found specifically that petitioner, both in the purchase and sale of the silver bullion, considered that it was engaged in a single transaction, and was acquiring and disposing of the silver as a single and entire investment, and that in selling the silver in instalments petitioner did not consider that it was separately transferring different interests in silver bullion (Finding 19, R. 14). These facts, supplemented by the finding that the nature of the market made it necessary to dispose of the silver in instalments, and that petitioner acted in a reasonable and prudent manner in marketing such a quantity of silver (Findings 14, 15 and 17, R. 12-14), constitute the basis of petitioner's claim that it transferred but a single interest in silver bullion. The statement in the Government's brief, made to support the argument that petitioner chose to split up this single interest into several interests, separately taxable, is in conflict with the Findings of Fact mentioned above.

2. The Government argues (Point 1, p. 5) that the case is disposed of by reference to the power of Congress to grant, limit or withhold deductions in determining income subject to tax. The cases cited in support of this proposition relate to those provisions of the Revenue Laws denying the right of the taxpayer to deduct from ordinary income net losses from special types of securities transactions. No case has been found in which any Court has held that the power of Congress to limit or withhold deductions extends so far as to deny the right to recoup capital in determining whether taxable income has arisen out of any single transaction or related group of transactions. It is one thing to group short

term purchases and sales of securities and to deny a deduction of a net loss on all transactions within such group. The reasonableness of the grouping is for Congress to determine. It is quite another thing, however, for Congress to provide that all profitable sales within the group shall be taxable without allowance of offset of losses on unprofitable sales within the group. That is what has been done in the Silver Tax Law, as applied in this case; and such a construction of the law results in a tax upon gross receipts and not upon income.

3. The Government urges (Point 1, p. 5) that the silver tax is also a valid excise; and asserts that a tax with respect to the profit upon the sale of personal property has always been considered an indirect tax. *Willcuts* v. *Bunn*, 282 U. S. 216, is cited as authority for this statement; but it scarcely sustains that burden. That case merely decided that the imposition of the income tax upon the profits from the sale of state bonds was not a direct burden on the borrowing capacity of the state. The Court was dealing with the income tax and no question was presented concerning the nature or validity of an excise. It is true that Chief Justice Hughes, in the opinion in that case, speaks of a tax upon profits made upon purchases and sales as an "excise upon the result of the combination of several factors including capital investment and, quite generally, some measure of sagacity; * * *". It is plain, however, that the Chief Justice was using the word "excise" in its generic sense, and not in its constitutional setting. Had the Government's argument ever been tenable, the Sixteenth Amendment would have been unnecessary. In *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, this Court emphasized the fact that the constitutional classification of direct taxes, on the one hand, and duties, imposts and excises, on the other, is mutually exclusive, saying that in the Constitution the latter

class is "put in antithesis to direct taxes" (158 U. S. at 622). In both the *Pollock* case and *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, this Court treated a tax on gains from sales of personal property as a direct tax, and therefore excluded such taxes from the constitutional group of excises.

The warning contained in *Eisner* v. *Macomber*, 252 U. S. 189, that Congress may not, by a definition of income, escape from constitutional limitations, should be observed today more closely than ever when novel and ingenious methods of taxation are increasingly resorted to by Congress and state legislatures. Constitutional limitations are entitled to respectful consideration, and should not be whittled away by legislative subterfuges.

4. The Government makes the bald assertion (p. 6) that each sale amounted to a separate transfer of an interest in silver, within the exact words of the statute. This statement, as pointed out above, is in conflict with the Findings of Fact of the Court below. Tested either subjectively or objectively, petitioner's interest in silver was single and undivided, and the instalment sales did not alter that concept.

5. The Government argues (p. 7) that the legal fees were "in the nature of overhead". This argument is not tenable. Overhead expenses are those which are not traceable directly to a particular activity or project, but are apportioned generally among several different activities or projects. See *Church, Overhead Expenses*, p. 1 (McGraw Hill, 1930); *Clark, Economics of Overhead Cost*, p. 1 (Univ. Chg. Press, 1923).

The item of legal expenses was incurred directly and solely in connection with the acquisition, holding and disposition of the silver bullion, and was not traceable to or connected with any other activity of petitioner (Finding, p.

21, R. 14, 15). It was therefore within the statutory class of allowable deductions.

Respectfully submitted,

BAER & MARKS,
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Dated: New York, February 11th, 1941.

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